ELECTCOMS SDN BHD

v.

INTERNET TECHNOLOGY ASIA VENTURES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[ORIGINATING SUMMONS NO: D5-24-275-2001]
28 SEPTEMBER 2002

CONTRACT: *Construction - Investment agreement - Performance - Agreement for subscription of shares in plaintiff subject to procurement of further investment - Failure to obtain further investment within stipulated time - Whether shares redeemable by plaintiff - Variation - Defendant given extra time to remedy failure - Whether time still of the essence - Whether liable to comply within reasonable time - Contracts Act 1950, ss. 47, 64*

By an investment agreement dated 17 July 2000 ('the agreement'), the plaintiff agreed to issue two million of its 'redeemable convertible preference shares' ('RCPS') to the defendant for RM14,700,000. In consideration, the defendant undertook, within one month thereof, to obtain further investments of RM281,930,000 for the plaintiff ('the investment'). It was a term of the agreement that if the defendant had not secured the investment within the stated time, *ie*, on or before 16 August 2000, the plaintiff was entitled to redeem the RCPS within four months from the said date at the same price of RM14,700,000.

The defendant duly paid the plaintiff the said sum of RM14,700,000, but had failed to obtain the investment within the required time. This notwithstanding, upon the defendant's assurance that the investment was forthcoming, the plaintiff elected not to exercise the option to redeem, and instead allowed the defendant extra time to fulfill its obligation. The investment not having been realized still, on 31 May 2001, the plaintiff gave the defendant a one-month notice within which to obtain the investment, failing which it would exercise the right to redeem the RCPS. The defendant again failed to oblige, but refused to allow the plaintiff to redeem the RCPS. The plaintiff alleged that the defendant was liable to let it redeem the RCPS, and hence applied for declarations to the effect. The defendant argued that the plaintiff had effectively waived the right to redeem, and that the notice of 31 May 2001, in any case, was bad in law, having been given after the expiry of the period provided for such notice. Before the learned judge, the main issues that arose were: (i) whether time was of the essence of the agreement; (ii) whether the plaintiff could be said to have waived

its right to redeem the RCPS; (iii) whether by reason of the indulgence of time given to defendant, the defendant was relieved of its obligation to secure the further investments.

Held:

[1] In a case where time is of the essence of the contract, if the party who is in the right allows time fixed for completion to pass and allows the defaulting party to try to remedy his default, then time is no longer of the essence. When time is no longer of the essence and no time for performance is specified, the promise, by virtue of s. 47 of the Contracts Act 1950, must be performed within a reasonable time. (pp 263 f & 264 g)

[2] It is clear that the plaintiff had never waived its right to redeem the RCPS. Its right to redeem the RCPS had thus never been lost. The evidence showed that the plaintiff had not proceeded to redeem the RCPS before 18 December 2000 only because of the continued assurance of the defendant that the investment was forthcoming. (p 266 c)

[3] The waiver notwithstanding, after the defendant had failed in its last attempt to secure investors, the plaintiff was entitled to give notice to the defendant, as it did herein, fixing a reasonable time for the defendant to perform its obligation. What is reasonable must depend on the circumstances of the case. (p 266 d-e)

[4] Considering that the parties had entered into a contract of commerce which in substance involved the injection of capital into the company, and considering that originally a short time frame had been set for the defendant to secure such funding, the period of one month fixed by the plaintiff for the defendant to perform is reasonable. (p 266 f)

[4a] By virtue of the provision of cl. 11(d) of the agreement which provides that "as regards any time, date or period … so extended as aforesaid time shall be of the essence" time once again becomes of the essence. Consequently, the defendant is now liable to let the plaintiff redeem the RCPS strictly upon the expiry of the one month period from the date of the notice dated 31 May 2001, failing which it would have committed a breach and the plaintiff would be able to redeem the RCPS at any time thereafter. (p 266 g-h)

[5] The plaintiff's indulgence in waiving the time for performance has the reciprocal effect of canceling the essential time within which the plaintiff itself had to exercise its option to redeem the RCPS from the defendant, for had the plaintiff opted to exercise its option then, the indulgence granted to the defendant would have been nugatory. It is thus futile for the defendant to argue that the plaintiff had forfeited its right to redeem because it failed to exercise that option under cl. 9A(d)(i) within the stipulated four months. (p 267 a-b)

[Order in terms of application.]

Case(s) referred to:

Allied Marine Transport v. Vale do Rio Doce Navegacao SA (The Leonidas D) [1985] 1 WLR 925 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(foll)***

Mega Air Conditioning Sdn Bhd v. Speedfam Co Ltd [2001] 4 CLJ 261 CA ***(refd)***

Paul Murugesu Ponnusamy v. Cheok Toh Gong & Ors [1996] 2 CLJ 397 SC ***(refd)***

Stickney v. Keeble & Anor [1915] AC 386 ***(refd)***

WJ Alan & Co v. El Nasr Export & Import Co [1972] 2 QB 189 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 47, 64

Other source(s) referred to:

Pollock & Mulla, *Indian Contract and Specific Relief Acts*, 11th edn 1994, vol 1, p 585

For the plaintiff - Loh Siew Cheang (Roy Sreenivasan); M/s Cheang & Ariff
For the defendant - Eugene Jayaraj; M/s Zaid Ibrahim & Co

Reported by WA Sharif

JUDGMENT

Kang Hwee Gee J:

In this originating summons the plaintiff seeks the following remedies:

1) A declaration be given, that upon a true construction of cl. 4.1(a) of the investment agreement dated 17 July 2000 made between the plaintiff and the defendant and other parties, the right of the defendant to subscribe for shares in the plaintiff and its rights to continue as a member of the plaintiff thereafter is subject to a further consideration or undertaking on the part of the defendant to secure or confirm the participation of further investment in a sum of RM281,930,000 within one (1) month from 17 July 2000.

2) A declaration be given, that upon a true construction of cl. 4.1(e) of the investment agreement, the plaintiff was entitled to redeem the shares issued to the defendant pursuant to cl. 4.1(a) of the investment agreement within four (4) months from 16 August 2000 in the event the defendant failed to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 16 August 2000.

3) A declaration be given, that in the circumstances of the case, the defendant having failed to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 16 August 2000 and indulgence of time having been given to it by the plaintiff to perform the same, the defendant had not been released from its obligation to do so.

4) A declaration be given, that, in the circumstances of the case, the defendant having failed to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 16 August 2000 notwithstanding the indulgence granted to it, the plaintiff could by a letter dated 31 May 2001 make time of the essence again with respect to the defendant's obligation to discharge its undertaking to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 16 August 2000.

5) A declaration be given, that upon the failure of the defendant to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 30 June 2001, the plaintiff has the right to redeem the shares at anytime on or before 30 October 2001.

6) An order be given, that upon the payment of the redemption sum of RM14,700,000 to the defendant by the plaintiff, the defendant shall forthwith, and in any event not later than two (2) working days from the date of payment aforesaid, surrender and deliver the whole of its redeemable cumulative preference shares ('RCPS') (being 2,000,000 RCPS) to the plaintiff for cancellation.

7) An order be given, that if the defendant should fail to surrender and deliver the same to the plaintiff, within the time stated in prayer 6 above, the RCPS are deemed cancelled and that the plaintiff be at liberty to delete the name of the defendant or its nominee from its share register.

8) A declaration be given, that all persons who are the nominee directors of the defendant in the plaintiff cease to be directors of the plaintiff with immediate effect from the date the remedies in prayer 6 or 7 above take effect.

9) A declaration be given, that the investment agreement is deemed terminated upon the plaintiff redeeming the RCPS from the defendant.

The factual background to support this summons may be gleaned from the affidavit of the plaintiff's managing director, Ong Boon Kheng.

For clarity, I propose to reproduce the relevant paragraphs *verbatim* as follows:

4. By an Investment Agreement dated 17.7.2000 entered into between the Plaintiff, the Defendant and various other parties, the Plaintiff agreed to issue 2,000,000 Redeemable Convertible Preference Shares ("RCPS") to the Defendant in consideration of the Defendant paying the sum of RM14,700,000 and obtaining further investments in the sum of RM281,930,000 ("the Agreement"). A copy of the Agreement is now produced and shown to me and marked as Exhibit "OBK-1".

5. The relevant express terms, *inter alia*, insofar as the Plaintiff and Defendant are concerned, are as follows:

   (a) Within a period of 5 working days from 17.7.2000, the Defendant shall subscribe and the Plaintiff shall issue to the Defendant, 2,000,000 RCPS at the price of RM7.35 per share, totaling RM14,700,000 ("the Issue Price").

   (b) In consideration of the Plaintiff agreeing to issue the RCPS to the Defendant at the Issue Price, the Defendant undertakes to obtain the participation of new investors to invest an amount of RM281,930,000 ("Further Funding") within 1 month from 17.7.2000 ("the Date").

   (c) The Further Funding shall be raised by way of subscription by the new investors in RCPS and/or convertible bonds to be issued by the Plaintiff and the terms of the equity financing or funding by the new investors shall be as agreed upon between the Plaintiff, the Defendant and the new investors.

   (d) In the event the Defendant fails to obtain new investors within the stipulated period, the Plaintiff is entitled but not obliged to redeem the RCPS at the price of RM7.35 per share within 4 months from the Date.

   (e) Upon redemption of the RCPS, the Agreement will terminate and be null and void.

6. The Defendant paid the sum of RM14,700,000 on or about 19.7.2000 but failed to bring in the Further Funding as promised by 16.8.2000.

7. Accordingly, the Plaintiff was entitled to redeem the RCPS and terminate the Agreement from that date onwards. Nevertheless, since the Defendant had assured the Plaintiff that the Further Funding would definitely be forthcoming, the Plaintiff allowed extra time to the Defendant to obtain the Further Funding.

8. On 13.9.2000, the Defendant reported to the board of directors of the Plaintiff of the continuing efforts being made by the Defendant to obtain the Further Funding. A copy of the minutes of the meeting is now produced and shown to me and marked as Exhibit "OBK-2".

9. Subsequently, as part of the Defendant's efforts in fulfilling its obligations under the Agreement, Amanah Merchant Bank Berhad (now known as "Alliance Merchant Bank Berhad") ("AMBB") was approached to assist in a private placement of the Plaintiff's shares to raise the Further Funding it promised. A facsimile dated 21.9.2000 from AMBB to the Defendant together with a letter of agreement dated 25.9.2000 between AMBB and the Plaintiff is now produced and shown to me and marked collectively as Exhibit "OBK-3".

10. The Defendant expected the private placement by AMBB to proceed successfully and the Plaintiff, being convinced by the Defendant, gave its co-operation to the private placement route of the Defendant. In fact, relying on the Defendant's representations, the Plaintiff did not redeem the RCPS on 17.12.2000, thereby giving the Defendant an extension of time. Had the Plaintiff done so, the Defendant's attempt to fulfil its obligations would have been frustrated.

11. However, the private placement failed. This was confirmed by a letter dated 19.1.2001 from AMBB advising that the private placement be deferred until such time when the market condition improves, taking into account the negative market sentiments at the material time. A copy of a letter dated 19.1.2001 from AMBB is now produced and shown to me and marked as Exhibit "OBK-4".

12. As a result of this, the Plaintiff wrote to the Defendant on 22.1.2001 informing the Defendant of the deferment of the private placement and of the Plaintiff's decision to redeem the RCPS. A copy of the letter dated 22.1.2001 is now produced and shown to me and marked as Exhibit "OBK-5".

13. Notwithstanding the Plaintiff's decision to redeem the RCPS and terminate the Agreement, the Defendant still continued to express their commitment to the Plaintiff. A copy of a letter dated 26.2.2001 from the Defendant is now produced and shown to me and marked as Exhibit "OBK-6".

14. As a result, a meeting was held on 9.3.2001 between the Plaintiff and the Defendant. During this meeting, various matters were discussed, including the Defendant's failure to obtain the Further Funding in accordance with their obligations under the Agreement. The Plaintiff reiterated that the sum of RM14,700,000 would be returned to the Defendant to redeem the RCPS unless the Agreement was varied to the extent that the Defendant would not be entitled to interfere with the operations of the Plaintiff's business. The Defendant's representative expressed their willingness to consider a variation of the Agreement. A copy of the minutes of this meeting is now produced and shown to me and marked as Exhibit "OBK-7".

15. In reply to Exhibit "OBK-6" above and pursuant to the said meeting, the Plaintiff wrote a letter to the Defendant setting out the understanding reached between the parties. A copy of the letter dated 12.3.2001 is now produced and shown to me and marked as Exhibit "OBK-8".

16. To the Plaintiff's surprise, the Defendant rejected both the alternatives proposed by the Plaintiff but instead proposed that the Plaintiff redeem the RCPS at the higher price of RM9.19 per share. A copy of the letter dated 15.3.2001 is now produced and shown to me and marked as Exhibit "OBK- 9".

17. As this was not acceptable to the Plaintiff and in variance to the earlier understanding reached, the Plaintiff issued a written notice dated 31.5.2001 to the Defendant, giving them 1 month to fulfil their obligations to procure the Further Funding, failing which the Plaintiff would exercise their rights to redeem the RCPS. A copy of the letter dated 31.5.2001 is now produced and shown to me and marked as Exhibit "OBK-10".

18. The Defendant did not procure the Further Funding nor did they allow the Plaintiff to redeem the RCPS. The correspondence between the Plaintiff and the Defendant dated 6.6.2001, 19.6.2001 and 21.6.2001 is now produced and shown to me and marked collectively as Exhibit "OBK-11".

19. Accordingly, the Plaintiff has come to this Honourable Court, seeking, *inter alia*, a declaration that the Plaintiff is still entitled to redeem the RCPS.

20. The Plaintiff is and has at all times been prepared to return the sum of RM14,700,000 to the Defendant to redeem the RCPS.

The Essential Terms And Conditions

The essential terms and conditions in the agreement in so far as they concerned the defendant and are relevant for the determination of the declarations sought herein, are as follows:

(a) **Clause 3(b)** – Within a period of five working days from 17 July 2000, the defendant shall subscribe and the plaintiff shall issue to the defendant, 2,000,000 RCPS at the price of RM7.35 per share, totaling RM14,700,000 ("the issue price").

(b) **Clause 4.1(a)** – In consideration of the plaintiff agreeing to issue the RCPS to the defendant at the issue price, the defendant undertakes to obtain the participation of new investors to invest an amount of RM281,930,000 ("further funding") within one month from 17 July 2000.

(c) **Clause 9A(d)(i)** – The plaintiff shall be entitled but not obliged by written notice to redeem all of the RCPS held by the defendant at the price of RM7.35 per share within a period of four months commencing from the date next after expiry of one month from the date of the said agreement if the defendant fails to procure new investors within one month from the date of the said agreement.

(d) **Clause 11(d)** – Any time, date or period mentioned in any provision of the agreement may be extended by mutual agreement between the parties but as regards any time, date or period originally fixed and not extended or any time, date or period so extended as aforesaid time shall be of the essence.

(e) **Clause 11 (b)** – "Release and Indulgence. Any liability to any party hereunder may in whole or in part be released, compounded or compromised or time or indulgence given by any other party hereto in writing in their absolute discretion as regards any of the parties under such liability without in any way, prejudicing or affecting their rights against any party or parties under the same or a like liability, whether joint and several or otherwise. No waiver of any breach or default hereunder shall be considered valid unless made in writing and signed by the party giving such waiver, and no such waiver, or any failure or delay on the part of any party to exercise any right, power, or privilege under this Agreement, shall be deemed a waiver of any subsequent breach or default of the same or similar nature, nor shall any single or partial exercise of any such right, power or privilege preclude any further exercise thereof or of the exercise of any other right, power or privilege.

Defendant's Position

The defendant did not dispute that it had entered into the investment agreement. Neither did the defendant deny that pursuant to the agreement it had subscribed and paid for the 2,000,000 RCPS at the price of RM7.35 per share, totaling RM14,700,000 ("the issue price"), and that it had failed to secure the new investors within one month from 17 July 2000 and thereafter despite substantial attempts.

The thrust of the defendant's case however, rests on its contention that:

1) The plaintiff only gave notice of its intention to redeem the RCPS at the price of RM7.35 per share for the first time on 22 January 2001 after expiry of the four month period provided under cl. 9A(d)(i) of the said agreement contrary to cl. 9A(d)(i) of the said agreement which expressly provides that the plaintiff shall be entitled but not obliged by written notice to redeem all of the RCPS held by the defendant at the price of RM7.35 per share within a period of four months commencing from the date next after expiry of one month from the date of the said agreement. It is undisputed that notice was only given by the plaintiff for the first time on 22 January 2001 after expiry of the four month period.

2) The defendant had not at any time granted an extension of time to redeem the RCPS and as such the plaintiff was obliged to redeem the RCPS within the time stipulated.

3) Between the period of August 2000 to December 2000, the plaintiff had never demonstrated any intention of redeeming the RCPS at the price of RM7.35 per share or reserved its rights to do so and is therefore now estopped from redeeming at the same price.

The Issues

Having determined the area of dispute the plaintiff has correctly framed the following questions for the determination of the court:

1. Whether, upon a true construction of cl. 4.1(a) of an investment agreement dated 17 July 2000 made between the plaintiff and the defendant and other parties, the right of the defendant to subscribe for shares in the plaintiff and its right to continue as a member of the plaintiff thereafter is subject to a further consideration or undertaking on the part of the defendant to secure or confirm the participation of further investment in a sum of RM281,930,000 within one (1) month from 17 July 2000.

2. Whether, upon a true construction of cl. 4.1(e) of the investment agreement, the plaintiff is entitled to redeem the shares issued to the defendant pursuant to cl. 4.1(a) of the investment agreement within four (4) months from 16 August 2000 in the event the defendant failed to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 16 August 2000.

3. Whether, in the circumstances of the case, the defendant having failed to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 16 August 2000 and indulgence of time having been given to it by the plaintiff to perform the same, the defendant had thereby been released from its obligation to do so.

4. Whether, in the circumstances of the case, the defendant having failed to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 16 August 2000, notwithstanding the indulgence granted to it, the plaintiff could, by a letter dated 31 May 2001, make time of the essence again with respect to the defendant's obligation to discharge its undertaking to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 16 August 2000.

5. Whether, upon the failure of the defendant to secure or confirm the participation of further investment in a sum of RM281,930,000 on or before 30 June 2001, the plaintiff has the right to redeem the shares at anytime on or before 30 October 2001.

The Law

Two related principles of contract law have to be applied to answer the questions. The first is with respect to the performance of a contract. The second is with respect to time being made an essence of performance.

As counsel for the defendant had rightly submitted the plaintiff must perform exactly what they have undertaken to do under the investment agreement. Indeed as submitted by counsel for the defendant, that was what Mohd Noor Ahmad JCA had ruled in *Mega Air Conditioning Sdn Bhd v. Speedfam Co Ltd* [2001] 4 CLJ 261 CA at p. 266:

> The general rule is that a party to contract must perform exactly what he undertook to do (*re Chitty on Contracts* 26th edn, vol. 1 para. 1991). It is not open to the courts to revise the words used, by the parties, or to put upon them a meaning other than that which they ordinary bear, in order to bring them with what the courts think the parties ought to have intended (*re ibid*, para. 827).

But His Lordship in that case was speaking of the general rule – in such cases as where the other party is insisting on the strict performance of the bargain, or where there is no variation to the agreement respecting such performance by indulgence or otherwise. Under the common law as indeed under s. 64 of the Contracts Act 1950, parties to a contract are quite free to vary the performance of their contract by modifying or altering its terms by mutual consent thereby affording the parties some flexibility in the performance of their

obligations. The principle is well entrenched. As Peh Swee Chin SCJ in the Supreme Court case of *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased) v. Cheok Toh Gong & Ors* [1996] 2 CLJ 397 SC at p. 408 said:

> In the first place, both parties to an agreement are entitled to vary any term of the agreement in writing, or orally, where oral evidence of such variation can of course be given, to quote s. 92(d) of the Evidence Act 1950, 'save in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to registration of documents'. The above agreement is not of those excepted cases.
>
> It is important to remember that when it is sought to prove a variation, not by an express agreement but by a course of conduct, that both parties have understood the variation and intended to be bound by it. In the instant case, the variation in question was sought to be proved by a course of conduct, *vide* the evidence set out earlier, and the court would have to be satisfied that the variation to cl. 3 in question was both understood by the purchaser and the vendors, and that they all intended to be bound by it. What the court would have to be so satisfied would depend on the surrounding circumstances.

In law where time is expressly made the essence as in the instant case, the time fixed for performance must be strictly complied with such that the failure of a party to perform an essential term therein constitutes a breach with the right to the other party to terminate the contract. But as with all terms in a contract, a party may expressly or by implication waive his right to insist on the other party's performance by a fixed time. The law is set out clearly in the judgment of NH Chan JCA in *Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89 at pp. 101-103:

> In a case where time is of the essence of the contract, if the party who is in the right allows the time fixed for completion to pass and allows the defaulting party to try to remedy his default (in the present case the plaintiff was even allowed to complete the project), then time is no longer to be regarded as of the essence of the contract (*Loke Yuen Cheng v. Vimtex Sdn Bhd*, at p. 178). See *Luck v. White* [1973] 26 P & CR 89 at p. 95 where Goulding J said:
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> > The notice to complete expired early in September. The vendors did not then, as they had threatened, either rescind the contract or resell the property. Instead they continued to discuss the possibilities of completion and ultimately agreed to November 16. It would have been easy for the vendors to reserve their rights in express terms. They might, for example, have extended the period for compliance with the notice to a specified date, time to be of the essence in that regard. Indeed, the mere extension of the period to a new fixed date would

> on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect. The vendors, however, did nothing of the kind. They encouraged the purchaser to try to complete notwithstanding the expiry of the notice, and there was nothing to tell him (that is, the purchaser) at what moment the axe would fall.

And, the judge encapsulated the principle in this way, at p. 96:

> If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstances.

See also Goff LJ in *Buckland v. Farmer & Moody*, at p. 942:

> Waiver, however, is based on encouraging the purchaser to think that he will be given time indefinitely and will not be cut off without further notice.

In *Webb v. Hughes* [1870] LR 10 Eq 281, Malins V-C said, at p. 286:

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract.

Since the defendant did not rescind the contract under s. 56(1) of the Contracts Act 1950 when the plaintiff failed to complete on 31 January 1981 but instead had allowed the completion date to pass and had even allowed the plaintiff to remedy his default by permitting him to continue to work on the project until it was wholly completed, time was no longer to be regarded as of the essence of the contract. And when time is no longer of the essence of the contract, s. 56(1) (which is only applicable to cases where the parties to the contract have intended that time is essential) no longer applies.

When time is no longer of the essence of the contract and no time for performance is specified, the promise must be performed within a reasonable time. Section 47 reads:

> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

As to what is a reasonable time to have the contract performed is, in each particular case, a question of fact. But where one party has been guilty of unnecessary delay, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end. The remedy at law for one party to call off the contract unilaterally in this way if he finds

the other guilty of unnecessary delay has survived unscathed to the present day because equity would not assist the party who had been guilty of impropriety (see *Famshed Khodaram Irani v. Burjori Dhunjibhai* [1915] 32 TLR 156 at p. 157). In *Webb v. Hughes*, Malins V-C said at p. 286:

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated. But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown.

See also Pollock & Mulla, *Indian Contract and Specific Relief Acts* (11th edn, 1994), vol 1 at p. 585:

> Either party's general right to have the contract performed within a reasonable time according to the circumstances is, of course, unaffected by the fact of time not being the essence; and in case of unnecessary delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the contract as at an end (*Stickney v. Keeble & Anor* [1915] AC 386).

In *Stickney v. Keeble & Anor* [1915] AC 386, the headnote reads:

> Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, ...

Where no time for performance is specified, s. 47 of the Contracts Act 1950 allows the promise to be performed within a reasonable time. But if there has been unnecessary delay by one party, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end. Here, in the present case, the defendant did not give notice of its intention to give up the contract if the plaintiff still fails to complete at the time specified in the notice.

Applying The Law And Answering The Questions

Questions 1 and 2 need not be deliberated upon as it is not in dispute that the defendant was, after subscribing to the RCPS, obliged to secure or confirm the participation of further investment in a sum of RM281,930,000 within one (1) month from 17 July 2000, failing which the plaintiff would have been entitled to redeem the RCPS within four (4) months from 16 August 2000.

Only questions 3, 4 and 5 need to be considered.

Time

It is clear that the plaintiff had never waived its right to redeem the RCPS. Its right to redeem the RCPS has therefore, never been lost. The evidence points unequivocally to the fact that the plaintiff had not proceeded to redeem the RCPS before 18 December 2000 only because of the continued assurance of the defendant that the investment was forthcoming and after the parties' attempt to arrive at an amicable settlement failed.

By allowing the time within which the defendant had to find investors to pass and by allowing the defendant to continue to find investors after it had passed, following *Hock Huat, supra*, time could now no longer be of the essence as the plaintiff must be deemed to have waived that condition.

But as counsel for the plaintiff had rightly submitted, after the defendant had failed in its last attempt to secure investors, following the *Hock Huat Foundry* case, the plaintiff was entitled to give notice to the defendant fixing a reasonable time for it to perform its obligation and what is reasonable depends on the circumstances of the case.

Considering that the parties had entered into a contract of commerce which in substance involved the injection of capital into the company and therefore a matter of some urgency, and considering that originally a short and tight time frame had been set for the defendant to secure such funding, the period of one month fixed by the plaintiff for the defendant to perform is under the circumstances reasonable.

By virtue of the provision of cl. 11(d) which provides that "as regards any time, date or period ... so extended as aforesaid time shall be of the essence" time becomes once again of the essence. Consequently, the defendant is now liable to let the plaintiff redeem the RCPS strictly upon the expiry of the one month period from the date of the notice dated 31 May 2001, failing which it would have committed a breach and the plaintiff would be able to redeem the RCPS at any time thereafter.

The indulgence on the part of the plaintiff to waive the time for performance in turn, has the reciprocal effect of cancelling the essential time within which the plaintiff itself had to exercise its option to redeem the RCPS from the defendant under cl. 9A(d)(i) – for had the plaintiff opted to exercise its option any earlier, the indulgence granted to the defendant would have been rendered nugatory. It is therefore futile for the defendant to argue that the plaintiff had forfeited its right to redeem because it failed to exercise that option under cl. 9A(d)(i) within the stipulated four months commencing from the date next after the expiry of one month from the date of the said agreement, that is to say, by 18 December 2000.

It is equally futile for the defendant to argue that any waiver was ineffective by virtue that the second limb of cl. 11(b) which provides that "no waiver of any breach or default hereunder shall be considered valid unless made in writing and signed by the party giving such waiver", for it must by their reciprocity be deemed to have waived the entire operation of cl. 11(b) itself in so far as the requirement that a waiver must be in writing is concerned. The position would be different if only one party had alleged that the other had waived it – in which case the fact that the waiver was not in writing and signed by the former may render it inoperative.

Estoppel

It is also untenable for the defendant to submit that the plaintiff is now estopped from redeeming the RCPS at the original price of RM7.35 per share by reason that the plaintiff had never demonstrated its intention of doing so before its option expired on 17 December 2000.

Basically the doctrine of estoppel operates to deny a party from insisting on his strict legal right only in cases where he had made a representation or promise to the other that he would not enforce it, and that party had acted on that promise or representation that it would be unjust for the court to enforce that legal right. The following passage from the judgment of Lord Denning in *WJ Alan & Co. v. El Nasr Export & Import Co.* [1972] 2 QB 189 cited with approval by the Court of Appeal in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 at 297 provides the exegesis of the doctrine:

> If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

It is obvious that the doctrine would not apply in the instant case. Firstly, the defendant had not acted on any representation of the plaintiff that would be unjust for the court to enforce its strict legal right. Secondly, the defendant had never been led to believe that it would not redeem those shares. The mere fact that the plaintiff did not indicate to the defendant that it would be exercising its option to redeem those shares was insufficient to constitute an estoppel by conduct or representation for "it is difficult to imagine how silence and inaction can be anything but equivocal" (*Allied Marine Transport v. Vale do Rio Doce Navegacao SA (The Leonidas D.)* [1985] 1 WLR 925 at 937).

The answers to Questions 3, 4 and 5

The answers to Question 3 must be answered in the negative and to Questions 4 and 5 in the affirmative.

It must be added however, that the plaintiff was at liberty to exercise its option to redeem the RCPS immediately after the defendant's failure to comply with the notice dated 31 May 2001, that is to say by 30 June 2001. The plaintiff need not have to wait until 30 August 2001 to exercise its option but has to do so within a reasonable time failing which it may in turn be deemed to have forfeited that right.

An order in terms of the application is granted.